UNITED NATIONS

AT

Administrative Tribunal

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ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 639

Case No. 693: LEUNG-KI

Against: The Secretary-General of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Luis de Posadas Montero, Vice-President, presiding; Mr. Mikuin Leliel Balanda; Mr. Mayer Gabay;

Whereas at the request of Fat-Chun Leung-Ki, a staff member of the United Nations Conference on Trade and Development, hereinafter referred to as UNCTAD, the President of the Tribunal, with the agreement of the Respondent, extended to 30 September 1992 the time-limit for the filing of an application to the Tribunal;

Whereas, on 29 August 1992, the Applicant filed an application requesting the Tribunal, inter alia:

"...

(d) To examine [whether] the methods of restructuring of the Commodities Division in UNCTAD (particularly, in the instance of this case, by an Officer-in-Charge recently transferred from another Division) ... damaged career prospects of staff members such as the Applicant...

(e) To examine [whether] ..., the Officer-in-Charge of the Commodities Division (who was subsequently removed) has a deep-seated prejudice against staff members of certain racial backgrounds...

(f) To declare that [the Officer-in-Charge of the Commodities Division's] assessment of the Applicant's supervisory ability was tainted with prejudice and was done without consultation with his immediate supervisor.

(g) To declare that the aforesaid assessment has inflicted great moral and psychological torments on the Applicant and his family, ... contributing to the deterioration of his health...

(h) To compensate the Applicant, at least partly, for the medical and surgical costs, as well as to reimburse the United Nations ... for ... the costs borne by it.

(i) To restore the Applicant's prospects for career development and that his promotion should be favourably considered if recommended by his supervisors."

Whereas the Respondent filed his answer on 26 February 1993;

Whereas, on 22 June 1994, the presiding member of the panel ruled that no oral proceedings would be held in the case;

Whereas the facts in the case are as follows:

The Applicant entered the service of the Organization on 23 May 1974, as an Associate Economic Affairs Officer at the P-2, step 1 level, in the United Nations Economic Commission for Africa, at Addis Ababa. On 1 February 1975, he was granted a probationary appointment and on 1 March 1976, a permanent appointment. The Applicant was promoted to the P-3 level, with effect from 1 April 1977. On 1 April 1978, he was transferred to UNCTAD in Geneva, as an Economic Affairs Officer in the Minerals and Metals Branch of the Commodities Division. He was promoted to the P-4 level, with effect from 1 April 1981.

In a memorandum dated 29 January 1988, the Secretary-General of UNCTAD announced to the staff that a reorganization would be conducted within the UNCTAD Secretariat. On 1 February 1988, the Officer-in-Charge of the Commodities Division (who had recently been transferred from another division) invited staff members of the Division to submit their views on the reorganization. On 9 March 1988, the Secretary-General of UNCTAD held a general meeting for UNCTAD staff, to explain the principal aims of the reorganization.

In a communication dated 20 May 1988, the Secretary-General of UNCTAD announced to the staff his plan for the reorganization of

the Secretariat, the "main decisions on reorganization" and "how and when they are to be implemented". Section III of that communication explained the new structure of the Commodities Division where the Applicant worked. According to the record, on 15 June 1988, the Officer-in-Charge met with the staff to discuss the reorganization and on 22 June 1988, the Applicant met with the Director of Programme Support and Management Services concerning his career development prospects in light of the forthcoming reorganization of the Commodities Division.

On 30 June 1988, the Officer-in-Charge of the Commodities Division informed all its staff of "the new structure of the Division, as approved by the Secretary-General ... as shown in the attached chart". According to the chart, the Applicant had not been appointed Chief of Section (Officer-in-Charge) of the Ferrous Minerals and Metals Section.

On 12 December 1988, the Applicant requested the Secretary-General of the United Nations to review the administrative decision not to appoint him Officer-in-Charge of the Ferrous Minerals and Metals Section.

In a reply dated 25 April 1989, the Assistant Secretary-General for Human Resources Management informed the Applicant that the Secretary-General had decided to maintain the decision. He stated, inter alia,that "staff members are subject to assignment by the Secretary-General to any of the activities or offices of the United Nations and, consequently, do not have a right to any particular post or assignment. ... The decision not to designate [the Applicant] Officer-in-charge of the Ferrous Minerals and Metals Section was, therefore, within the authority of the Secretary-General of UNCTAD... as there is no evidence to substantiate ... that his decision not to appoint [the Applicant] Officer-in-charge ... resulted from prejudice...".

On 27 June 1989, the Applicant lodged an appeal with the Geneva Joint Appeals Board (JAB). The JAB adopted its report on 6 February 1992. Its conclusions and recommendations read, in part, as follows:

"Conclusions and recommendations

38. ...the Panel unanimously:

(b) Concludes that the restructuring of UNCTAD was carried out within the discretionary authority of the UNCTAD Secretary-General;

(c) Further concludes that adequate consultation took place in this respect;

(d) Finally, concludes that the Appellant was unable to substantiate his claim that the contested decision was vitiated by prejudice and other extraneous factors.

39. Accordingly, the Panel makes no recommendation in support of the appeal."

On 20 February 1992, the Director, Office of the Under-Secretary-General for Administration and Management, transmitted to the Applicant a copy of the JAB report and informed him as follows:

> "The Secretary-General has re-examined your case in the light of the Board's report. He fully shares the Board's conclusions and has therefore decided, in accordance with its recommendation, not to accept your appeal."

On 29 August 1992, the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. The JAB erred in concluding that adequate consultation took place at the Applicant's level and that the Applicant had not substantiated that the decision was vitiated by prejudice and other extraneous factors.

2. The methodology used to restructure the Commodities Division overlooked relevant General Assembly resolutions and disregarded administrative instructions.

3. The Officer-in-Charge of the Commodities Division was prejudiced against those with certain racial backgrounds, which affected his assessment of the Applicant's supervisory ability.

Whereas the Respondent's principal contentions are:

1. The reorganization fell within the discretionary powers of the Respondent, and would be open to challenge only if tainted with prejudice or improper motive.

2. The selection of staff for a particular post is the exercise of a discretionary power by the Respondent and can be challenged only if it is tainted with prejudice or improper motive.

3. Staff members have no right to be assigned to any specific post.

4. The Applicant's claim of prejudice is not supported by any credible evidence.

The Tribunal, having deliberated from 21 June to 13 July 1994, now pronounces the following judgement:

I. The Applicant's principal contention is that the proper method for restructuring the Commodities Division was not followed, as the Secretary-General of UNCTAD failed to apply the guidelines established by the relevant General Assembly resolutions and by administrative instructions. Therefore, the Tribunal must examine, in the first place, whether UNCTAD followed proper procedures, as stipulated in the relevant documents.

II. The Applicant refers to certain documents dealing with the reorganization of UNCTAD, claiming that the Respondent did not follow directives found therein when he restructured the Commodities Division. These documents are:

- The Secretary-General's bulletin ST/SGB/150/Rev.1, dated 1 June 1977, entitled "Changes in the Functions and Organization of Secretariat Units".

- Administrative instruction ST/AI/338, dated 22 December 1986, entitled "Vacancy Management and Staff Redeployment".

- General Assembly resolution 43/224/A, dated 21 December 1988, entitled "Personnel Questions".

III. As indicated in a memorandum dated 20 May 1988, from the Secretary-General of UNCTAD, implementation of the reorganization was to proceed in conformity with the administrative and management procedures set out in ST/SGB/150/Rev.1. This memorandum also indicated that arrangements at the Division and Programme level would be carried out "on the basis of recommendations emerging from consultative processes ... which will permit staff members to express their views on issues of concern to them."

In the Tribunal's view, this directive was followed and consultations took place on several occasions.

IV. By memorandum dated 1 February 1988, staff members were invited to submit their views on the restructuring of the Division. The then Officer-in-Charge of the Division also met with each staff member individually to seek his or her views.

In March, the Secretary-General of UNCTAD invited all staff members to a meeting to discuss the reorganization plan. He replied to questions put to him. In May 1988, the Deputy-Director of the Commodities Division discussed, with the staff, the proposed reorganization and assignments. Although the Applicant was absent during this time, the Tribunal is not convinced that his absence caused him any harm, as the discussions held during this time do not appear to have been conclusive. As stated by the Secretary-General of UNCTAD in the 20 May memorandum, the internal structure of the Commodities Division was to be determined, after further consultations. These consultations took place on 15 June 1988, when the then Officer-in-Charge outlined a proposal for reorganization to the staff.

V. The Applicant also consulted the Director of Programme Support and Management Services and the Secretary-General of UNCTAD, regarding the effect of the reorganization proposal on his

career prospects. Following this last meeting, the Applicant met once again with the then Officer-in-Charge to discuss the matter.

In light of the above, the Tribunal is satisfied that appropriate consultations were held with the staff regarding the reorganization of the Commodities Division, in conformity with the Secretary-General's Bulletin ST/SGB/150/Rev.1.

VI. The Tribunal agrees with the JAB's view that administrative instruction ST/AI/338 , on Vacancy Management and Staff Redeployment, was not violated in the present case because the reorganization of the Commodities Division did not result in the availability of a vacant post of Chief of Section for which the Applicant might have applied. The Chief of the Division reassigned another staff member, which he was entitled to do, according to paragraph 3 of the above-mentioned instruction.

VII. As the JAB noted, General Assembly resolution 43/224/A was adopted after the reorganization of UNCTAD and after the submission of the Applicant's request for review of the decision not to appoint him Chief of Section. This General Assembly resolution cannot therefore be applied to his case.

VIII. Nevertheless, as requested by the Applicant, the Tribunal has reviewed General Assembly resolution 43/224/A. It calls inter alia for the need to maintain the principle of equitable geographical distribution in the upper echelons of the Secretariat, and for improved representation of developing countries at senior levels. It underscores the importance of a geographically balanced international civil service. The Applicant claims that the reorganization of the Commodities Division did not conform to these criteria. The Tribunal is unable to find anything in the documentation to support the Applicant's claim.

IX. The Applicant's second contention is that due to discrimination or prejudice on the part of the Officer-in-Charge of

the Commodities Division, he was bypassed in the selection process for the post of Officer-in-Charge of the Ferrous Minerals and Metals Section.

The Applicant claims that the Officer-in-Charge of the Commodities Division had a deeply-seated prejudice against staff members of certain racial background. However, the evidence put forward does not support his claim. On the contrary, the Applicant himself wrote in his rebuttal letter of 29 December 1989, that he "always had cordial working relations" with the Officer-in-Charge. In addition, it is inferred from this letter that the Applicant believed that the Officer-in-Charge was acting in good faith and did not seem to hold a personal bias when he re-organized the Division. In fact, the Applicant believes that other constraints seem to have motivated his decision. His letter states inter alia:

> "From the situation which [the Officer-in-Charge] explained to me, there was no question of supervisory ability as a factor in his decision for not recommending me for a supervisory assignment. On the contrary, I was given to understand that he faced a number of constraints, including pressure from outside the Commodities Division, and he also said that I should wait."

X. In claims of prejudice or discrimination, the burden of proof is on the party alleging it. Hence, in order to succeed, the Applicant must prove the existence of prejudice or discrimination. Unless the Applicant can demonstrate that the reorganization was tainted by prejudice or some other improper motive, the reorganization of an office falls within the discretionary powers of the Administration. The Tribunal will not examine whether a given office should be organized in any particular way or whether better results would be obtained if a reorganization took or failed to take place. (Cf. Judgement No. 117, Van der Valk (1968), Judgement No. 350, Raj (1985) and Judgement No. 412, Gross (1988)).

XI. The only document produced by the Applicant, in support of his claim of discrimination, is a chart entitled "Patterns of

promotion in the UNCTAD Secretariat at the P-5 level, 1973-1984". The relevance of this document is unclear. It does not show that the Applicant suffered discrimination in the context of the restructuring.

XII. The Applicant further contends that due to the restructuring of the Commodities Division, his career prospects have been damaged. However, in its Judgement No. 350, Raj (1985), the Tribunal held that "the mere fact that a reorganization may hinder the prospects or in any way affect the career of a staff member does not necessarily point to the existence of discrimination or improper motives in the Administration and thus, does not in itself give grounds for any claim against the decision taken." The Tribunal emphasizes that the evaluation and selection of a staff member for a particular post rests within the discretionary authority of the Secretary-General and that such a decision can be challenged only on the grounds of prejudice or improper motive (Judgement No. 312, Roberts (1983)).

XIII. The Applicant has asked the Tribunal to look for the motivation behind the selection of the Chief of Section. The Applicant does not dispute the Officer-in-Charge's discretionary authority to reassign staff within the division for which he is responsible. What he claims is that this discretion is not absolute. The Tribunal notes in this regard that the Officer-in-Charge's discretion was not absolute. He had to abide by certain rules of fairness and administrative procedures before he was able to make his decisions. As is pointed out by C.F. Amerasinghe in The Law of the International Civil Service (Vol. I, pp. 357-358):

> "What all discretionary decisions have in common is that a 'fair' procedure or 'due process' be followed when they are taken, fairness or the appropriateness of process being relative to the nature of the decision taken."

XIV. The Applicant has the onus of proving that he was not selected Officer-in-Charge of his section due to extraneous factors, such as prejudice, improper motive or discrimination. He did not provide sufficient proof to discharge that onus. Therefore, this claim must also fail.

XV. With respect to the Applicant's claim for compensation for a service-incurred medical condition, he must turn to the Advisory Board on Compensation Claims. The Tribunal is not the proper forum to deal with such a claim at this stage.

XVI. The Tribunal concludes that the reorganization of the Commodities Division, as well as the decision not to assign the Applicant as Officer-in-Charge of the Ferrous Minerals and Metals Section, were not tainted with prejudice or other improper motive. The Tribunal finds that the claim for compensation for a service-incurred injury is not properly before the Tribunal.

XVII. For the foregoing reasons, the Tribunal rejects the application in its entirety.

(Signatures)

Luis de POSADAS MONTERO
Vice-President, presiding

Mikuin Leliel BALANDA
Member

Mayer GABAY
Member

Geneva, 13 July 1994

B. Maria VICIEN MILBURN
Executive Secretary